

1 HONORABLE RICHARD A. JONES
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12 UNITED STATES DISTRICT COURT
13 WESTERN DISTRICT OF WASHINGTON
14 AT SEATTLE
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17 UNITED STATES OF AMERICA,
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19 Plaintiff,

20 v.
21 ROMAN V. SELEZNEV,

22 Defendant.

23 CASE NO. CR 11-70 RAJ
24
25 ORDER
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19 **I. INTRODUCTION**

20 This matter comes before the court on defendant's motion to limit the
21 prosecution's use of his [REDACTED] statement at trial. Dkt. # 250. For the reasons stated
22 below, the motion IS GRANTED IN PART.

23 **II. BACKGROUND**

24 In December of 2014, defendant agreed to meet with and be interviewed by
25 federal law enforcement agents in an effort to negotiate a pretrial resolution of this case.

1 Prior to that meeting, defendant signed a [REDACTED] agreement that provided, in relevant
2 part:

3 **5. Impeachment:** If your client should testify materially
4 contrary to the substance of the [REDACTED], or otherwise present
5 in a legal proceeding either directly or through counsel, a
6 position materially inconsistent with the [REDACTED], the [REDACTED]
7 may be used against your client as impeachment or rebuttal
8 evidence, or as the basis for a prosecution for perjury or false
9 statements. Nothing in this letter is intended to preclude your
10 client from challenging the sufficiency of the United States'
11 evidence; calling into question the credibility of the United
States' witnesses; questioning United states witnesses about
their knowledge and qualifications' challenging
inconsistencies in the United States' evidence; or challenging
the United States' witnesses about their motives for testifying
against your client.

12 **6. Derivative Use:** The United States may make derivative
13 use of, and may pursue investigative leads suggested by, any
14 statements or information provided by your client's [REDACTED].
15 This provision is necessary to eliminate the necessity of a
16 *Kastigar* hearing in which the United States would have to
17 prove that the evidence it seeks to introduce at trial or in a
related legal proceeding is derived from a "legitimate source
18 wholly independent" of statements or information from the
[REDACTED].

19 The [REDACTED] agreement also included the following declaration.

20 I have read the above [REDACTED] agreement carefully and
21 reviewed every part of it with my attorney. I understand and
voluntarily agree to the [REDACTED] agreement.

22 (Agreement) Dkt. # 270-1, p. 2-3.

23 After signing the agreement, the defendant then proceeded to provide the
24 government with information regarding his own involvement in the crimes charged in the
25 Second Superseding Indictment. Defendant refused, however, to provide any
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1 information regarding the involvement of any other individuals. As a result, the
2 negotiations fell apart and the parties failed to reach a plea agreement.

3 Defendant now contends that he did not fully understand the [REDACTED] agreement
4 because the agreement was drafted in English and his attorneys failed to adequately
5 explain it to him. Although Defendant has some proficiency in English, it is not his
6 native language. His native language is Russian and throughout these proceedings he has
7 relied on the assistance of certified Russian translators.

8 On March 29, 2016, the attorneys who represented defendant during the [REDACTED]
9 session testified before this court at an evidentiary hearing. Ms. Anna Goykhman, an
10 attorney and Russian speaker who immigrated to the United States at age 11, testified that
11 she translated the [REDACTED] agreement for the defendant paragraph-by-paragraph and
12 responded to his questions. Tr. at 88:11-25; 90:13-15. Ms. Goykhman conceded,
13 however, that she is not a certified translator and that she has limited Russian language
14 abilities. Tr. at 103: 6-16. Mr. Steven Fogg, an experienced criminal defense attorney,
15 also explained the agreement to the defendant, but required Ms. Goykhman's assistance
16 in doing so because he does not "speak any Russian whatsoever." Tr. at 120:1-18;
17 126:16-19.

18 The defendant also testified at this hearing and confirmed that Ms. Goykhman
19 went over the [REDACTED] agreement with him paragraph-by-paragraph. Tr. at 62:22-63:4.
20 Defendant further stated that he "even asked her questions." *Id.*; *see also* Tr. at 74:10-
21 75:1.

22 There is some dispute, however, as to whether the defendant actually received a
23 certified translation of the [REDACTED] agreement prior to signing it. Defendant insists that he
24 did not receive the translated version; Ms. Goykhman stated that "from her visual
25 memory, she thought [she] remembered him looking at the document" but cannot
26 remember how it was given to him; and Mr. Fogg testified that he is certain the defendant
27 had a copy of the translation. *Compare* Tr. at 75:8-18 with 109:3-12 and 130:4-5.

1 Additionally, there is some dispute regarding the legal advice given to the
 2 defendant with respect to paragraphs five and six quoted above. With respect to
 3 paragraph six, the defendant claims that his attorneys advised him that the government
 4 could pursue investigative leads derived from his statements, but that any such derivative
 5 evidence could only be used against others and not against him. Tr. at 92:21-93:4.
 6 However, both Ms. Goykhman and Mr. Fogg testified to the contrary. Tr. at 93:5-14;
 7 129:10-15.

8 With respect to paragraph five, the defendant testified that he understood that his
 9 [REDACTED] statements would limit *his* ability to testify, but that he was unaware that his
 10 statements would limit his *attorneys* in any way. Tr. at 63:10-19. Ms. Goykhman later
 11 confirmed that she failed to advise the defendant regarding these limitations. *See* Tr. at
 12 99:23-100:1 (“Q. Did you tell him that his attorneys would no longer be able to infer
 13 information that contradicted his statements in the meeting? A. I did not.”). Indeed, Ms.
 14 Goykhman stated that she, herself, did not fully understand paragraph five and, therefore,
 15 had “certainly” failed to adequately explain it to the defendant. Tr. at 102:2-12. Mr.
 16 Fogg also testified that he failed to specifically explain these limitations. Tr. at 128:2-4;
 17 133:14-24; 134:19-24.

18 Finally, Mr. Fogg testified that he advised the defendant that after he signed the
 19 [REDACTED] agreement, he would not be able to “do a straight up innocence defense.” Tr. at
 20 132:16-18. Later, however, Mr. Fogg drew a distinction between an “innocence” defense
 21 and a “not guilty” defense, not knowing that no such distinction existed in the Russian
 22 language. Tr. at 133:10-13.

23 III. ANALYSIS

24 Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(f)
 25 exclude from admission into evidence statements made by a criminal defendant during
 26 plea negotiations. Although a defendant can waive the right to preclude the use of these
 27 statements, that waiver must be knowing and voluntary. *See U.S. v. Mezzanatto*, 513

1 U.S. 196, 210 (1995). A waiver is made knowingly only if the defendant has a “full
 2 awareness of both the nature of the right being abandoned and the consequences of the
 3 decision to abandon it.” *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

4 In applying the “knowing and voluntary” standard to determine whether a
 5 defendant has waived his rights under exclusionary rules for plea agreements, the
 6 Supreme Court adopted the heightened standard reserved for waiver of rights essential to
 7 a fair trial and the reliability of the adjudicative process. *See Brady v. United States*, 397
 8 U.S. 742, 748 (1970) (“Waivers of constitutional rights not only must be voluntary but
 9 must be knowing, intelligent acts done with sufficient awareness of the relevant
 10 circumstances and likely consequences.”). The Second Circuit has held that a waiver of
 11 such essential rights should be enforced only “if the record clearly demonstrates that the
 12 waiver was both knowing (in the sense that the defendant fully understood the potential
 13 consequences of his waiver) and voluntary.” *United States v. Ready*, 82 F.3d 551, 557
 14 (2d Cir. 1996), superseded on other grounds as stated in *United States v. Cook*, 722 F.3d
 15 477, 481 (2d Cir. 2013). Further, agreements containing waivers of such essential rights
 16 are to be construed narrowly because they “are unique contracts in which special due
 17 process concerns for fairness and the adequacy for procedural safeguards obtain.” *Id.* at
 18 556, 558-59 (internal citations and quotations omitted).

19 Here, the facts suggest that the defendant knowingly and voluntarily agreed to
 20 paragraph six of the [REDACTED] agreement. Although he contends that he was unaware that
 21 derivative evidence could be used against him, his attorneys testified to the contrary. Tr.
 22 at 129:10-15 (“Q. And did you explain to him that those leads or what the government
 23 found could be used against him? A. Yes.; Q. Did you ever tell him that these things
 24 could only be used against other people? A. No.”). Having observed this testimony and
 25 considered the additional circumstances surrounding the entry of this agreement, the
 26 court credits counsel’s version of the facts.

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1 The court cannot, however, make the same finding with respect to paragraph five.
2 The totality of the testimony suggests that this paragraph was not adequately explained to
3 the defendant and that he signed the [REDACTED] agreement without fully understanding its
4 consequences and the scope of his waiver. It appears that the defendant understood that
5 he, personally, could not testify inconsistently with his [REDACTED] statements, but he was
6 unaware that the same limitation applied to his attorneys. Although this may seem
7 illogical to a person knowledgeable about the American legal system, the court notes that
8 the defendant is not a lawyer, not a native English speaker, that he signed an English
9 version of the [REDACTED] agreement and that there is a credible dispute regarding whether he
10 received a certified translation prior to signing away his rights.

11 Most importantly, the court notes that his attorneys admitted that they failed to
12 specifically explain how paragraph five would limit their abilities to present his case.
13 Although Ms. Goykhman translated the exact wording of paragraph five to the defendant,
14 she admitted that she, herself, did not understand its legal implications and that she did
15 not convey those implications to the defendant. Further, Ms. Goykhman testified that she
16 is not a certified translator, that her Russian language skills are limited and that she was
17 not educated in the translation of legal terms. Mr. Fogg also failed to fully explain this
18 paragraph to the defendant. Although he explained generally that the [REDACTED] agreement
19 would preclude a “straight up innocence defense,” he failed to specify that paragraph five
20 would limit counsel’s ability to present his case and would prevent counsel from making
21 certain representations during opening, cross-examination and summation. *See, e.g.,*
22 *United States v. Burnett*, 2009 WL 2180373, at *3 (E.D. Pa. July 17, 2009) (invalidating
23 portion of [REDACTED] agreement where facts suggested that defendant “did not understand
24 that the waiver would affect how his attorney could present his case, essentially muzzling
25 counsel and rendering counsel ineffective during trial.”); *see also United States v.*
26 *Lauersen*, 2000 WL 1693538 (S.D.N.Y. Nov. 13, 2000) (precluding government from
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1 using the defendant's [REDACTED] statements for anything other than impeachment of
2 defendant's testimony).

3 Accordingly, it appears that the defendant may not have fully appreciated the
4 consequences of paragraph five. For these reasons, the court finds that the defendant's
5 [REDACTED] statement may be used for impeachment purposes only.

6 That said, counsel is not without constraints at trial. The court is duty bound to
7 protect the integrity of the proceeding and to ensure that matters presented to the jury are
8 grounded in good faith. Consequently, counsel will not be permitted to elicit substantive,
9 non-impeachment testimony, either on cross-examination of witnesses called by the
10 government or from witnesses called to testify on behalf of the defendant or to present
11 arguments to the jury at any stage of the proceedings that directly contradict specific
12 factual statements made by the defendant at the [REDACTED] session.

13 **IV. CONCLUSION**

14 Based upon the foregoing, the court GRANTS IN PART defendant's motion and
15 holds that the defendant's [REDACTED] statements may be used for impeachment purposes
16 only. However, absent a good-faith basis, defendant's counsel may not present evidence
17 or arguments on defendant's behalf that directly contradict specific factual assertions
18 made by the defendant at his [REDACTED] session. The motion is otherwise DENIED.

19 Dated this 29th day of April, 2016.

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The Honorable Richard A. Jones
United States District Judge